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## Introduction

K.S.A. 60-3332, *et seq.*, adopted by the Kansas Legislature in 1995, has two major provisions: (a) affording an evidentiary privilege to information obtained in an environmental audit report based on specified criteria; and (b) affording immunity from civil, administrative, or criminal penalties if certain violations of environmental law are voluntarily disclosed.

## Audit Reports

Audit reports are sets of documents prepared as the result of an environmental audit. Environmental audits are voluntary evaluations undertaken by the owner or operator of a facility to determine whether the facility is in compliance with environmental laws. The audit may be undertaken by the owner or operator of a facility, an employee of the owner or operator, or a qualified auditor, i.e., a person who has education, training and experience in preparing studies and assessments.

The audit report provision of K.S.A. 60-3332, *et seq.* allows for information collected during an audit to be considered privileged based on specified criteria. The privilege means the information is not admissible as evidence in any legal action. According to K.S.A. 60-3332, *et seq.*, however, the information is subject to discovery (review by a regulatory agency or an opposing attorney).

Privilege is afforded to the audit report information based on the following criteria:

- The information was not already required to be “collected, developed, maintained, or reported to” a regulatory agency.

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- The information was not generated by a regulatory agency.
  - The information was not obtained from a source outside of the audit process.
  - The privilege was not waived by the owner or operator of the facility who caused the audit to be performed.

However, a judge or hearing officer may determine the privileged information must be disclosed under certain circumstances. Those circumstances include: if that privilege was asserted to perpetrate a fraud; if the information demonstrates noncompliance with environmental laws that is not being addressed promptly and with diligence; or if the party asserting the privilege has not implemented an environmental management system to assure regulatory compliance. K.S.A. 60-3332, *et seq.*, specifies the characteristics a management system must contain in order to retain the privilege of an audit. The following are characteristics of the system:

- It applies to all parts of a person’s operation covered under one or more environmental laws.
- It regularly takes steps to prevent and remedy noncompliance.
- It has the support of senior management.
- It implements policies and procedures emphasizing the importance of compliance with environmental laws.
- It ensures the policies and procedures are effectively communicated to all individuals whose activities affect compliance with environmental laws.
- It specifies high-level and operations management that has responsibility to

oversee compliance with the policies and procedures.

- It provides for regular review of compliance status including prevention and remedy of noncompliance.
- It provides assurance that employees can report unlawful conduct within the organization without fear of retribution.
- It provides that standards and procedures to ensure compliance are enforced through appropriate employee performance, evaluation, and disciplinary mechanisms.

K.S.A. 60-3332, *et seq.* encourages the development of an environmental management system meeting the criteria listed above. Not only does it provide for audit privilege, it also directs courts or hearing officers to consider whether an entity has implemented an environmental management system when determining penalties for violations of environmental laws. If a system has been implemented, the court or hearing officer may choose not to impose a penalty, or to reduce the size of the penalty.

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### ***Voluntary Disclosure of Violations***

The second provision allows for immunity from civil, administrative, or criminal penalties if certain violations of environmental laws are voluntarily disclosed. While this immunity covers many violations, there are certain criteria that must all be met for the disclosure to fall within the scope of K.S.A. 60-3332, *et seq.* The following are used as criteria

- The disclosure was made promptly upon its discovery.
- The disclosure was made to the regulatory agency having authority with regard to the violation disclosed.
- The disclosure arose from an environmental audit.
- The person making the disclosure diligently initiated action to resolve the problem.
- The person making the disclosure cooperated with the appropriate agency in investigating the violation identified in the disclosure.

The immunity from penalties does not apply if it is established that:

- The disclosure was not voluntary in nature, i.e., it was required to be reported to a regulatory agency.
- The violation was committed willfully by the person making the disclosure.
- The violation was not fully corrected in a diligent manner.
- The violation caused significant environmental harm or a public health threat.

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To ensure proper handling of a voluntary disclosure, the person making the disclosure should report it in writing to:

Kansas Department of Health and Environment  
Director, Division of Environment  
1000 SW Jackson, 4th Floor, Suite 400  
Topeka, Kansas, 66612

A form is available to assist you in making the written disclosure. For further information on K.S.A. 60-3332, *et seq.*, please call (785) 296-0669 for a copy of the KDHE policy towards environmental audits.

This brochure is intended to provide guidance in interpreting K.S.A. 60-3332, *et seq.* as it applies to environmental auditing and disclosure of violations of environmental laws administered by KDHE. It should not be considered as a substitute for the actual law.

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### ***What You Need to Know About***

## ***Environmental Auditing and Voluntary Disclosure***



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